IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 18, 2006 Session

THE *TENNESSEAN*, ET AL. v. TENNESSEE DEPARTMENT OF PERSONNEL, ET AL.

Appeal from the Chancery Court for Davidson County
No. 05-2338-II Carol McCoy, Chancellor

No. M2005-02578-COA-R3-CV - Filed on April 27, 2007

The *Tennessean* and one of its reporters requested employment harassment investigation files from the Department of Personnel pursuant to the Public Records Act. The Department withheld selected documents claiming that they were protected by the attorney client privilege and/or work product doctrine and, therefore, exempt from the Act's disclosure requirements. The *Tennessean* and its reporter petitioned the Chancery Court to require disclosure under the Act. The trial court found the selected documents were protected by the attorney client privilege and/or work product doctrine. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Alfred H. Knight, Alan D. Johnson, Nashville, Tennessee, for the appellants, The *Tennessean* and Brad Schrade.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, Janet M. Kleinfelter, Senior Counsel, for the appellees, Tennessee Department of Personnel, Deputy Commissioner Nathaniel E. Johnson and Assistant Commissioner and General Counsel Kae Carpenter.

OPINION

On September 14, 2005, the *Tennessean* and its reporter Brad Schrade (collectively referred to as "*Tennessean*") filed a petition for access to certain public records under the Public Records Act, Tenn. Code Ann. § 10-7-505 ("Act"). The *Tennessean* named as respondents the Tennessee Department of Personnel ("Department"), its Deputy Commissioner Nathaniel E. Johnson, and its General Counsel Kae Carpenter. The petition concerned the *Tennessean's* request for certain

documents which the Department claimed were protected by attorney client privilege and/or the work product doctrine.

On May 12, 2005, the *Tennessean* e-mailed a request to the Department for access to Department files for the last ten harassment investigations which involved the Department. The records relate to harassment investigations wherein the Department played a role. On May 25, 2005, the Department responded by letter producing records from the investigation files. The Department's letter also provided a brief summary of the investigations. While the vast majority of requested documents were produced, the Department withheld a few specific documents on the basis of attorney-client privilege and/or work product doctrine.[1] After being requested by the *Tennessean* to describe the documents being withheld, the Department sent the *Tennessean* a letter providing a description of the documents which the Department claimed were privileged.

The trial court held a hearing on the *Tennessean*'s petition for access. The *Tennessean*'s argument before the trial court was based on polices that required the Department to investigate claims of harassment. According to its argument below, if the investigation is done in the normal course of business, then the records pertaining to it cannot be protected. The trial court elected to view *in camera* the withheld documents. The following is the standard the trial court stated it would use while viewing the documents:

> The key issue regarding the applicability of the privilege is the purpose of the various components of the investigation that defendant initiated into plaintiff's allegation of sexual harassment. [If] the purpose was to provide legal advice or to prepare for litigation, then the privilege applies. If the purpose was simply to enforce defendant anti-harassment policy or to comply with its legal duty to investigate and to remedy the allegations, then the privilege does not apply.

After reviewing the documents, the trial court found that they were protected by the attorney-client privilege and attorney work product doctrine. The documents at issue were then returned to counsel for the State. The *Tennessean* appeals.

I. INVESTIGATION DOCUMENTS REQUESTED

As a general rule, the investigations were initiated to determine whether state employees had engaged in behavior proscribed by the State's Policy on Workplace Harassment.[2] The Policy

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[1] At oral argument, counsel for the State estimated that 260 documents related to the investigations were provided to the *Tennessean*, and 20 documents were withheld after being identified as protected.

[2] There is disagreement between the parties as to whether the Policy itself governed several of the particular investigations. For example, a couple of the investigations were initiated not because of a "reported complaint" but at the request of the Governor. Also, there is a dispute about whether a couple of the alleged harassers were state officials included within the Policy. For reasons that are discussed later, we do not believe the applicability of the Policy to (continued...)

provides that the State is committed to "provide an environment free of [unlawful] harassment of an individual." The Policy describes what constitutes prohibited harassment, how to report such harassment, and how any complaint will be investigated. With regard to investigations, the Policy provides as follows:

> The department will conduct a thorough and neutral investigation of all reported complaints of workplace harassment . . . as soon as possible. . . . The department retains the sole discretion to determine whether a violation of this policy has occurred and to determine what level, if any, of disciplinary action is warranted.

A state employee or applicant who wishes to file a complaint under the Policy is directed to do so within his or her particular department, either to the personnel director, department head, supervisor, or any individual designated by their department to receive reports. If for some reason an employee or applicant believes he or she cannot file a complaint within the particular department involved, then the Policy provides that the complaint be addressed to the Department of Personnel, either the EO/AA Division or the Employee Relations Division. If a complaint involves an executive director, assistant commissioner, deputy commissioner, or commissioner, the Policy provides the employee or applicant may file the complaint with the Department of Personnel, EO/AA Division.

Of the ten files requested, five of the files contained material the Department claimed was privileged. During the course of this litigation, the parties agreed that documents in two of those files are no longer at issue.[3] The following are the summaries provided the *Tennessean* by the Department of the three investigations wherein documents currently at issue were withheld and the Department's description of the privileged documents.

> **1) Investigation 1.**
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> **[Summary]** - Based on reports of inappropriate behavior by one of his staff, the Governor requested the Department of Personnel to investigate the reports. Ms. Carpenter participated in the investigation. The accused is an executive service employee.
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> Based on the investigation, the Governor determined that the accused had violated the State's policy against workplace harassment. The accused was immediately removed from the Governor's staff and placed on limited administrative leave. The Governor has not reached a decision concerning the future employment of the accused.

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[2](...continued)
particular investigations is determinative.

[3]Based on an affidavit from the Department's counsel that the Department did not become involved in Investigation 2 until after an EEOC charge was filed, the *Tennessean* conceded at oral argument that its argument as to documents in Investigation 2 was eliminated. With regard to Investigation 9, the State waived the privilege protecting the withheld document and produced it, so the document withheld in Investigation 9 is no longer at issue.

Pursuant to Tennessee Code Annotated § 10-7-503(a), the Department of Personnel is not providing records for inspection that are protected by the attorney/client privilege and/or attorney work product doctrine.

[Documents Withheld] - Communication between the Governor's Legal Counsel and the General Counsel for the Department of Personnel.

2) Investigation 3.

[Summary] At the request of the Governor's office, the Department of Personnel investigated an allegation of a state employee's inappropriate interaction with an employee of a state vendor. The state employee was an executive service employee. The accused resigned from his position before there was a determination that this matter fell within the terms of the State's policy on workplace harassment. Ms. Carpenter participated in the investigation.

Pursuant to Tennessee Code Annotated § 10-7-503(a), the Department of Personnel is not providing records for inspection that are protected by the attorney/client privilege and/or attorney work product doctrine.

[Documents Withheld] - Communication between the Governor's Legal Counsel and the General Counsel for the Department of Personnel; handwritten notes created by the General Counsel of the Department of Personnel during the course of the investigation and in anticipation of litigation; documents acquired by the General Counsel of the Department of Personnel during the course of the investigation and in anticipation of litigation.

3) Investigation 6

[Summary] The Department of Personnel received a report that a career service employee had engaged in inappropriate conduct toward another career service employee.

After the investigation, the Department of Personnel determined that the employee had violated the State's policy on workplace harassment. The employee received a written warning and attended training on the State's policy on workplace harassment. Ms. Carpenter did not participate in the investigation.

Pursuant to Tennessee Code Annotated § 10-7-503(a), the Department of Personnel is not providing records for inspection that are protected by the attorney/client privilege and/or attorney work product doctrine.

[Documents Withheld] - An investigation memorandum drafted in anticipation of litigation and at the direction of the General Counsel for the Department of Personnel.

It is clear the Department of Personnel was involved in Investigations 1 and 3 at the request of the Governor. Investigation 6 involved a Department of Personnel employee, so pursuant to the Policy, the Department of Personnel would be involved. According to Ms. Carpenter's affidavit, she "either directed or participated in" Investigations 1, 3, and 6 in her capacity as an attorney in anticipation of litigation.

II. STANDARD OF REVIEW

This case involves interpretation of the Public Records Act and its exceptions recognized by state law. Issues involving the construction of statutes and their application to facts involve questions of law. *Memphis Publishing Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002); *Swift v. Campbell*, 159 S.W.3d 565, 570 (Tenn. Ct. App. 2004); *Waller v. Bryon*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999). Consequently, the presumption of correctness in Tenn. R. App. P. 13(d) does not apply, and we review the issue *de novo*. *King v. Pope*, 91 S.W.3d 314, 318 (Tenn. 2002); *Swift*, 159 S.W.3d at 570.

In the briefs submitted on appeal, the parties implicitly recognize that documents protected by attorney client privilege and the work product doctrine are exempt from the disclosure requirements of the Act, but do not directly address the source of that exemption. The State claims that these records are exempt from the Act since the Rules of Civil Procedure make them confidential, but provides no citation to the rules or other authority. The *Tennessean* does not take issue with the proposition that documents protected by attorney client privilege or the work product doctrine are exempt from the Act.[4]

In order to properly analyze the issues before us, however, we believe that we must begin by addressing the basis for any exemption from the Act, *i.e.,* which state law provides an exception, because any exception to the Act "must be supported by a specific source of authority." *Memphis Publishing Co. v. Memphis*, 871 S.W.2d 681, 686 (Tenn. 1994). As part of this analysis, we will identify the parameters of protection that may be afforded by the privilege and doctrine.

III. THE ACT AND ITS EXCEPTIONS

The Act requires public access to "all state . . . records." Tenn. Code Ann. § 10-7-503(a). "Record" means any material "made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." Tenn. Code Ann. § 10-7-301(6); *Memphis Publishing v. Memphis*, 871 S.W.2d at 687; *Griffin v. City of Knowxville*, 821 S.W.2d 921, 923 (Tenn. 1991).

While a number of specific exceptions to public access have been legislatively adopted, *see, e.g.*, Tenn. Code Ann. § 10-7-504, this case involves a more general exception included in the Act. As the Court of Appeals discussed in *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004), the relevant provision on exceptions to public access or disclosure has undergone language changes over the years. As enacted in 1957, records excluded from public access were those records whose confidentiality was "provided by law or regulations made pursuant thereto." *Id*. at 571. In 1984, this exception was narrowed to apply only to records made confidential by state statute. *Id*. Under the narrowed 1984 version, in order to be exempt from disclosure, the record had to be made confidential by the legislature. *Id*. Thereafter, in 1991, Tennessee Code Annotated § 10-7-503(a)

[4] At the hearing on the petition before the trial court, counsel for the *Tennessean* conceded this point.

was amended again to provide in its current form that the public access requirements of the Act did not apply to records if otherwise provided by "state law." *Id*. The provision in effect at all times relevant to the case before us read:

> (a) . . . [A]ll state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation, except any public documents authorized to be destroyed by the county public records commission in accordance with § 10-7-404, shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, **unless otherwise provided by state law.**

Tenn. Code Ann. § 10-7-503(a) (emphasis added).

Therefore, the permissible exceptions to the Act's disclosure requirements were broadened from statutory exceptions to also include exceptions found in any state law including the state constitution, common law, rules of court, and properly authorized rules and regulations, because each of these has the "full force and effect" of law in Tennessee. *Swift*, 159 S.W.3d at 571.

When interpreting the Act, however, we must remain mindful that the purpose of the Act is to promote public awareness of the government's actions and to ensure the accountability of government officials and agencies by facilitating access. *Memphis Publishing Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d at 74; *Swift*, 159 S.W.3d at 570. The Act creates a "clear mandate in favor of disclosure." *Tennessean v. Electric Power Bd.*, 979 S.W.2d 297, 305 (Tenn. 1998); *Swift*, 159 S.W.3d at 570. A presumption is created that the records described in Tenn. Code Ann. § 10-7-503 are open to the public. *State v. Cawood*, 134 S.W.3d 159, 165 (Tenn. 2004); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 785 (Tenn. 1999). The courts are instructed to interpret the Act broadly "so as to give the fullest possible public access to public records." Tenn. Code Ann. § 10-7-505(c).

The exceptions to the Act recognized by state law, however, are not subsumed by the admonition to interpret the Act broadly. These exceptions embody the legislature's decision that there are circumstances where the reasons not to disclose a record "outweigh the policy favoring disclosure." *Swift*, 159 S.W.3d at 571. Where the legislature has clearly established a statute's parameters, courts are not free to apply a "broad" interpretation that disregards specific statutory language.

In order to protect a record otherwise covered by the Act from public disclosure, the government must establish by a preponderance of the evidence that the record falls within an exception to the Act. Tenn. Code Ann. § 10-7-505(c). In order to do that, the government must show that the record is excluded from disclosure by state law. *Swift*, 159 S.W.3d at 571.

IV. ATTORNEY CLIENT COMMUNICATION

In order to be excluded by the Act, attorney client communications must be made confidential pursuant to state law. In Tennessee, certain attorney client communications are made confidential under three different sources of state law: statute, common law, and rules promulgated by the Tennessee Supreme Court.

The attorney client privilege has long been a part of the common law. The policy behind recognition of this oldest of privileges is that the administration of justice requires that communications between clients and their attorneys be free of concern that the communication would be publicly disclosed. *McMannus*, 39 Tenn. at 215-16; *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 212 (Tenn. Ct. App. 2002); *Bryan v. State,* 848 S.W.2d 72, 79 (Tenn. Crim. App. 1992).

Tennessee's statutory privilege is rooted in the common law, and the codification embodies the common law rule. *Johnson v. Patterson*, 81 Tenn. 626, 649 (1884); *McMannus v. State*, 39 Tenn. (2 Head) 213, 215-16 (1858). The statutory attorney client privilege, which was first enacted in 1821, is found in Tenn. Code Ann. § 23-3-105, which provides as follows:

> No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.

Not all communications between attorneys and clients are confidential. In order to be privileged under this statute, the communication between an attorney and client must meet two requirements; (a) it must involve the subject matter of the representation and (b) it must be made with the intent that the communication will be kept confidential. *State ex. rel. Flowers v. Tennessee Trucking Association Self Insurance Group Trust*, 209 S.W.3d 602, 616 (Tenn. Ct. App. 2006); *Boyd*, 88 S.W.3d at 213. *See Hazlett v. Bryant*, 192 Tenn. 251, 258, 241 S.W.2d 121, 124 (1951)*; Jackson v. State*, 155 Tenn. 371, 376, 293 S.W. 539, 540 (1927).

While the statute addresses only the client's communication to the attorney, the privilege also applies to communication from the attorney to the client "when the attorney's communications are specifically based on the client's confidential communications or when disclosing the attorney's communications would, directly or indirectly, reveal the substance of the client's confidential communications." *Boyd*, 88 S.W.3d at 213, *citing Burke v. Tennessee Walking Horse Breeders' & Exhibitors' Ass'n*, No. 01A01-9611-CH-00511, 1997 WL 277999, at *11 (Tenn. Ct. App. May 28, 1997) (No Tenn. R. App. P. 11 application filed); *Bryan*, 848 S.W.2d at 80.

As phrased, the statutory attorney client privilege is an evidentiary rule. Of course, a client has expectations that his or her attorney will not reveal confidential information in any setting and,

therefore, expects the attorney to maintain client confidences inviolate even in non-litigation settings. The Tennessee Supreme Court, in 1858, recognized the public purpose behind the statutory recognition of the privilege to be quite broad:

> Sound public policy seems to have required the establishment of the rule that facts communicated by a client to his counsel are under the seal of confidence, and cannot be disclosed in proof. It is a rule of protection to the client, more than a privilege to the attorney. The latter is not allowed, if he would, to be break this zeal of secrecy and confidence. It is supposed to be necessary to the administration of justice, and the prosecution and defence of rights, that the communications between client and their attorneys should be free and unembarrassed by any apprehensions of disclosure, or betrayal. The object of the rule is, that the professional intercourse between attorney and client should be protected by **profound secrecy**. It is not necessary to the application of this rule, as was held in some of the old cases, now overruled, that a suit should be pending or anticipated, (1 Greenl. On Ev. 240, note), . . .

McMannus v. State, 39 Tenn. (2 Head) 213, 215-16 (1858) (emphasis added).

Whether or not the statutory privilege applies in contexts other than testimony by the attorney is a question we need not decide in order to resolve this appeal, because the privilege has another source. However, we note that holdings by our Supreme Court in a case involving exceptions to the Open Meetings Act indicate that the Court would hold that the statutory attorney client privilege, embodying the common law privilege, is broader than just testimony. Those holdings also indicate that the Court would hold the statutory privilege creates an exception to the Public Records Act, were it necessary to reach that question.

The Tennessee Supreme Court in *Smith County Education Association v. Anderson*, 676 S.W.2d 328, 333 (Tenn. 1984), held that the statutory attorney client privilege was not an exception to the Open Meetings Act, Tenn. Code Ann. § 8-44-101, *et seq*. The Court in *Smith County* recognized that "[t]wo approaches, both based upon the same policy consideration" were offered to support the attorney-client privilege exception to the Open Meetings Act: the statutory privilege of Tenn. Code Ann. § 23-3-105 and the attorney's ethical duty not to betray the confidences of a client. *Id*. at 332. The court found that the attorney's duty to preserve confidences "provides a better basis for establishing an exception to the act." *Id*. at 332-33.

The Court found that the statutory privilege found in Tenn. Code Ann. § 23-3-105 was waived by passage of the Open Meetings Act, in essence finding a conflict between the two statutes with the Open Meetings Act controlling. That reasoning was based on the fact that the sole exception to the Open Meetings Act provides that all meetings shall be public "except as provided by the Tennessee Constitution." *Id*. at 333. Tenn. Code Ann. § 8-44-107(a). Consequently, the Open Meetings Act exception is narrow and does not include exceptions created by statute. For this reason, the Supreme Court relied on the alternative source for an exception created by law: the

ethical duty of a lawyer to preserve confidences found in the Supreme Court Rules which were promulgated in the exercise of the Court's *constitutionally delegated* authority.

Unlike the Open Meetings Act, the Public Records Act specifically excludes records protected by "state law," including statutory law. Consequently, the reason given by the Court in the *Smith County* case for determining that the privilege of Tenn. Code Ann. § 23-3-105 was not an exception to the Open Meetings Act does not apply to the Public Records Act analysis.

Even if the statutory, common-law based privilege were determined not to prohibit disclosure in other than a testimonial context, another source of state law prevents such disclosure. That is the same source used by the Court in *Smith County*.

The Tennessee Supreme Court, in exercising its constitutionally delegated authority, has promulgated rules governing the practice of law. *Smith County Education Association v. Anderson*, 676 S.W.2d at 333-34. As a consequence, the legislature is "without authority to enact laws which impair the attorney's ability to fulfill his ethical duties." *Id.*; *Memphis Publishing Co. v. Memphis*, 871 S.W.2d at 688. The disciplinary rules formerly found in the Code of Professional Responsibility, as adopted by the Tennessee Supreme Court, have the force and effect of law. *Coats v. Smyrna/Rutherford County Airport Authority*, No. M2000-00234-COA-R3-CV, 2001 WL 1589117 at *6 (Tenn. Ct. App. Dec. 13, 2001); *Clinard v. Blackwood*, No. 01A01-9801-CV-00029, 1999 WL 976582, at *6 (Tenn. Ct. App. Oct. 28, 1999) *aff'd*, 46 S.W.3d 177 (Tenn. 2001), citing *Gracey v. Madden*, 769 S.W.2d 497, 504 (Tenn. Ct. App. 1989) (Koch, J., dissenting); *King v. King*, No. 89-46-11, 1989 WL 122981, at *11 (Tenn. Ct. App. Oct. 18, 1989) (Koch, J. concurring) (No Tenn. R. App. P. 11 application filed).[5]

Effective March 1, 2003, the Tennessee Supreme Court adopted Rule 8 of the Supreme Court Rules and thereby replaced the Code of Professional Responsibility with the new Rules of Professional Conduct. Included in these Rules of Professional Conduct is Tenn. R. Sup. Ct. 8, RPC 1.6 governing confidentiality, which provides as follows:

> (a) Except as provided below, a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation.
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:
> (1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by Rule 3.3;
> (2) to secure legal advice about the lawyer's compliance with these Rules; or

[5] *See contra Clinard*, 1999 WL 976 WL 976582, at *6 fn. 28.

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney- client privilege or other applicable law; or

(3) to comply with Rules 3.3, 4.1, or other law.

The rule governing confidences established in Rule 1.6 is quite broad, encompassing "information relating to the representation of a client." The prior version of the Code of Professional Responsibility governing confidences, Canon 4, required a lawyer to "preserve the confidences and secrets of a client." When interpreting Canon 4, this court found that the scope of information then deemed "secrets" was broad, likening it to the scope of "confidential client information" under Restatement (Third) of the Law Governing Lawyers, § 59 (2002). *Image Outdoor Advertising, Inc. v. CSX Transportation, Inc.*, No. M2000-03207-COA-R3-CV, 2003 WL 21338700, at *9 (Tenn. Ct. App. June 10, 2003) (perm. app. denied Dec. 1, 2003).

Rule 1.6 makes no exceptions for governmental attorneys. Indeed, Comment 6 to Rule 1.6 specifically provides that the rule requiring confidentiality applies to government lawyers:

> The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

The Rules of Professional Conduct also refer to the obligations of government attorneys in the Section titled Scope, subsection (4):

> These Rules do not abrogate the powers and responsibilities of government lawyers as set forth under federal law or under the Constitution, statutes, or common law of Tennessee. The resolution of any conflict between these Rules and the responsibilities or authority of government lawyers under any such legal provisions is a question of law beyond the scope of these Rules.

The case before us does not present any question of conflict between the government lawyer's ethical obligation to maintain the confidentiality of information regarding representation and any other responsibility. It cannot be argued, and the Tennessean does not attempt to argue, that government officials lose the protections or rights of clients. The reasons supporting the

longstanding privilege apply with equal force to a government official who seeks legal advice in the performance of his duties. Such officials should be encouraged, rather than discouraged, to seek that advice.

Further, in subsection (7) of Scope, the Rules address their effect on attorney client privilege:

> Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

V. ATTORNEY WORK PRODUCT DOCTRINE

The work product doctrine is found in Rule 26.02(3) in the Tennessee Rules of Civil Procedure. Specifically, the Rule provides as follows:

> Trial Preparation: Materials. Subject to the provisions of subdivision (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
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> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37.01(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or

approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

The Rules of Civil Procedure are state law that may exempt documents from the disclosure requirements of the Act. *Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996); *Arnold v. Chattanooga*, 19 S.W.3d 779, 785 (Tenn. Ct. App. 1999);[6] *See Appman v. Worthington*, 746 S.W.2d 165, 167 (Tenn. 1987).

There have been several public policy reasons given for recognition of the work product doctrine. An attorney should not be inhibited in representing his or her client by concern that the attorney's file could be open to scrutiny and demand. *Arnold*, 19 S.W.3d at 786. The client's willingness to speak openly with an attorney should not be hampered by concern that secrets embodied in the attorney's work product would be open to inspection. *Id*. Yet another policy underlying this doctrine "is that attorneys preparing for litigation should be permitted to assemble information, to separate the relevant facts from the irrelevant and to use the relevant facts to plan and prepare their strategy without undue and needless interference." *State ex rel Flowers*, 209 S.W.3d at 617 (citing *Swift*, 159 S.W.3d at 572; *Boyd*, 88 S.W.3d at 218-19). This doctrine extends beyond confidential communications between the attorney and client to encompass "any document prepared in anticipation of litigation by or for the attorney." *State ex rel Flowers*, 209 S.W.3d at 617, citing *Swift*, 159 S.W.3d at 572.

In order to qualify as work product, the party seeking protection must establish the following three elements: (1) that the material sought is tangible, (2) that the documents were prepared in anticipation of litigation or trial, and (3) that the documents were prepared by or for legal counsel. Tenn. R. Civ. P. 26.02(3); *State ex rel Flowers*, 209 S.W.3d at 617 n. 15.

Any document that meets the definition of work product under Rule 26.02(3) of the Rules of Civil Procedure is exempt from the Act.

VI. DOCUMENTS AT ISSUE

The standard by which we are to decide whether the Act requires disclosure of the communications at issue is deceptively simple. Under the foregoing authority, it is clear that the attorney-client privilege and work product doctrine provide exceptions to the disclosure requirements of the Act.

The trial court examined the documents in question *in camera* and determined that they were included within the privilege and doctrine. As a consequence, the trial court held the documents were not subject to disclosure. The *Tennessean* does not directly challenge the trial court's finding

[6] In the event there existed a conflict between the Rules of Civil Procedure and the Act, Tenn. Code Ann. § 16-3-406 provides that once the Rules are effective, then "all laws in conflict therewith shall be of no further force or effect."

about the specific documents. Because the documents at issue in this case are not included in the record, this court has no basis on which to re-visit the question of whether those documents include information that would be included in the scope of either attorney-client privilege or the work product doctrine.

The *Tennessean*, however, argues that the attorney involved had a "duality" of function that robbed the documents of their protection in two respects. First, it argues that if counsel for the Department was representing both the State and the complaining party then this "duality of representation" eliminated the privilege. Second, it argues that if the purpose of the investigation was two-fold, *i.e.*, to comply with policy and to prepare for litigation, then this "duality of purpose" robs the documents of any privilege.

As its initial ground of appeal, the *Tennessean* posed the issue as whether the attorney client privilege or work product doctrine can be applied to prevent disclosure under the Act if the documents at issue were made by an administrative agent who, according to the *Tennessean*, "is admittedly representing the interests of both parties in attempting to resolve an administrative dispute." The Department, however, at no time "admitted" that it or its counsel represented the complaining party. This notion of "dual" representation could have arisen from some of the trial court's comments at the hearing.

> . . . And, Mr. Johnson [counsel for *Tennessean*], you pointed out a circumstance that is a dilemma for the state. When they have a complaining party, they represent not only the department, they represent the interest of the employee . . . there's dual function in the status of the attorney who represents the government.
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> The Department of Personnel attorney at issue, Kae Carpenter, filed an affidavit in this court specifying that as General Counsel, she is called upon to give legal advice to the Governor, Department Commissioner and other supervising employees.

The trial court did not say that the government attorney involved in these investigations was representing two parties. It is clear the trial court recognized the attorney "represents the government." The reference to a "dual function" does not equate to dual representation. We think the court simply recognized that the state has an interest in preventing harassment.

The *Tennessean's* second argument is that since these investigations were required by the Policy, then the privilege and doctrine are not applicable. In other words, if the investigation serves a purpose in addition to providing legal advice or to preparing for litigation, then disclosure is required. While the parties disagree about whether the Policy applies to these particular investigations, we do not find that distinction to be relevant. If documents generated during the course of any investigation are privileged under state law, then the Act does not require disclosure. It does not matter whether the investigation is required by law or policy. The issue is whether the specific documents contain communication that is subject to the attorney client privilege or work product doctrine.

One purpose of the type of investigation at issue herein, whether or not technically required by the Policy, is to provide a neutral investigation so the responsible government official can decide whether unlawful harassment has occurred and, if so, take appropriate action to address the issue. Part of that decision-making process is informed legal advice. Secondly, Ms. Carpenter's affidavit provides that another purpose of these investigations is to allow "the State to investigate potential wrongdoing more fully and pursue remedial options, so as to protect the State from extensive civil liability." There is no question that the State, as the employer, is subject to litigation after these types of allegations are made. The employer is subject to suit by the complainant claiming the employer inadequately addressed the harassment or, on the other hand, the employer is subject to being sued by the alleged harasser claiming the employer incorrectly found them responsible for harassment. Simply because an investigation may serve two purposes is not the determinative issue. The question is whether, during the course of the investigation, documents are generated that are protected by the attorney-client privilege or work product doctrine.

The *Tennessean* and the trial court placed great reliance on *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524, 691 A.2d 321 (N.J. 1997). In *Payton*, the defendant maintained that the attorney client privilege protected "the entire investigatory process" because defendant had attorneys participated in the investigation. 691 A.2d at 334. The court found the following standard was applicable:

> The key issue regarding the applicability of the privilege in this case is the purpose of the various components of the investigation: to provide legal advice or to prepare for litigation, then the privilege applies. However, if the purpose was simply to enforce defendant's anti-harassment policy or to comply with its legal duty to investigate and to remedy the allegations, then the privilege does not apply.

Id. at 551.

While the rationale of *Payton* has appeal and is not directly contrary to our analysis, we are not persuaded that the "purpose" analysis is helpful. As discussed earlier, once it is determined that a document is protected by the attorney client privilege, our analysis of whether it is exempt from the Act is complete. The standard in *Payton* appears to attempt to define what is privileged by reference to the "purpose" of the documents. A document may exist that serves both the purposes described in *Payton*. In other words, we recognize that the situation may not mutually be exclusive, *i.e.*, that a document may comply with the state's duty to investigate and also be privileged if it meets the applicable requirements.

The trial court is affirmed. Costs of this appeal are taxed to Brad Schrade and the *Tennessean* against whom execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE